KS Chua & Co v Chui Miang Chew & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-160 OF 1990
ABDUL MALIK ISHAK J
1 JUNE 1995

Civil Procedure *— Want of prosecution — Application to dismiss the claim for want of prosecution — Test — Intentional and contumelious delay — Inordinate and inexcusable delay — Prejudice to defendant — Abuse of process of the court — Rules of the High Court 1980 O 25 r 1(4)*

The plaintiffs claimed against the defendants for a sum of RM88,229, being the amount due in respect of alleged professional services rendered by the plaintiffs to the defendants under an agreement. The writ of summons and the statement of claim were served on the second and sixth defendants on 24 May 1989 whilst the rest of the defendants were served on 29 September 1989. The defence of the second and sixth defendants were served on the plaintiffs' solicitors on 16 September 1989 whilst defence and counterclaim in respect of the other defendants was served on the plaintiffs' solicitors on 19 December 1989. The amended defence and counterclaim of the second and sixth defendants was served on the plaintiffs' solicitors on 25 April 1990. As at 6 May 1990, the time when pleadings were deemed to be closed, no reply nor defence to counterclaim had been filed and served by the plaintiffs. The plaintiffs sought to filed and serve a reply and defence to counterclaim dated 8 June 1994. The delays computed after the date of the last service of the amended defence and counterclaim of the second and sixth defendants were more than four years. At no time did the plaintiffs and/or its solicitors obtain the defendants' consent for an extension of time. The defendants applied to dismiss the plaintiffs' claim for want of prosecution.

Held, allowing the application:

(1) What the plaintiffs did was an abuse of the process of the court as there were no applications made or an order of the court obtained by either the plaintiffs or their solicitors to enlarge time to enable them to file and serve the reply and defence to counterclaim on the defendants. The plaintiffs and/or their solicitors had failed to comply with the stipulated time period under O 18 r 3(4) of the Rules of the High Court 1980.

(2) The delay of four years was intolerable and inexcusable. The defendants must have suffered much anxiety and distress as the plaintiffs' claim of RM88,229 was still pending and it constituted serious and grave prejudice to the defendants.

(3) It was trite that where any relevant period of limitation had not expired it was pointless to dismiss an action for want of

prosecution because another action could be started for the same subject matter.

(4) The cause of action arose in January 1988 and by January 1993 that cause of action abated. In so far as the present case was concerned since limitation had set in, the application by the defendants to dismiss the plaintiffs' claim for want of prosecution was indeed apt.

(5) The court had power to dismiss an action for want of prosecution not only where the plaintiffs' default had been intentional and contumelious but also where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendant.

(6) What constituted inordinate delay was a question of fact and as a rule, until a credible excuse was made out, the irresistible inference was that the delay was patently inexcusable.

(7) The plaintiffs' delay was in the circumstances prolonged, inordinate and inexcusable. Public policy demanded that business of the courts should be conducted expeditiously. The plaintiffs clearly procrastinated and they authored their own downfall by not expeditiously prosecuting their claims.

(8) It was not incumbent upon the defendants to take out summons for directions themselves.

(9) The defendants' delay in prosecuting their counterclaim should not be construed against them.

(10) Whether the delay caused by the plaintiffs or by their solicitors or both affected the prejudice caused to the defendants was not a relevant consideration and was not a factor to be considered in considering whether to dismiss the plaintiffs' claim for want of prosecution.

[Bahasa Malaysia summary

Plaintif telah membuat tuntutan terhadap defendan untuk jumlah RM88,229, iaitu amaun yang kena dibayar berkenaan perkhidmatan profesional yang dikatakan telah diberikan oleh plaintif kepada defendan di bawah satu perjanjian. Writ saman dan pernyataan tuntutan telah disampaikan kepada defendan kedua hingga keenam pada 24 Mei 1989 sementara defendan yang lain telah menerima penyampaian pada 29 September 1989. Pembelaan defendan kedua hingga keenam telah disampaikan kepada peguamcara plaintif pada 16 September 1989 sementara pembelaan dan tuntutan balas defendan yang lain telah disampaikan pada peguamcara plaintif pada 19 Disember 1989. Pembelaan dan tuntutan balas defendan kedua dan keenam yang dipinda telah disampaikan pada peguamcara plaintif pada 25 April 1990. Pada 6 Mei 1990, bilamana pliding dianggap ditutup, tiada jawapan atau pembelaan kepada tuntutan balas telah difailkan dan disampaikan oleh plaintif.

Plaintif cuba memfailkan dan menyampaikan jawapan dan pembelaan kepada tuntutan balas pada 8 Jun 1994. Kelengahan jika dikira selepas tarikh penyampaian akhir pembelaan dan tuntutan balas defendan kedua dan keenam yang dipinda adalah lebih daripada empat tahun. Plaintif dan/atau peguamcaranya tidak sekali-kali mendapat persetujuan defendan untuk perlanjutan masa. Defendan kini membuat permohonan untuk membatalkan tuntutan plaintif kerana ketiadaan pendakwaan.

Diputuskan, membenarkan permohonan itu:

(1) Apa yang telah dilakukan oleh plaintif adalah satu penyalahgunaan proses mahkamah kerana tiada permohonan yang dibuat atau perintah mahkamah yang diperolehi sama ada oleh plaintif atau peguamcaranya untuk melanjutkan masa untuk membolehkannya memfailkan dan menyampaikan jawapan dan pembelaan kepada tuntutan balas pada defendan. Plaintif dan/atau peguamcaranya telah gagal mematuhi tempoh masa yang diperuntukkan di bawah A 18 k 3(4) Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Kelengahan empat tahun adalah teruk dan tidak boleh dimaafkan. Defendan semestinya telah mengalami banyak kerisauan dan kebimbangan kerana tuntutan plaintif sebanyak RM88,229 masih menantikan keputusan dan ini adalah prejudis yang serius dan teruk kepada defendan.

(3) Adalah undang-undang basi bahawa di mana tempoh had masa yang relevan belum luput tidaklah bermakna untuk membatalkan satu tuntutan kerana ketiadaan pendakwaan memandangkan yang satu tindakan lain boleh dimulakan untuk perkara yang sama.

(4) Kausa tindakan ini timbul dalam Januari 1988 dan menjelang Januari 1993 kausa tindakan itu telah luput. Dalam kes ini oleh kerana had masa telah berkuatkuasa, permohonan oleh defenda untuk membatalkan tuntutan plaintif kerana ketiadaan pendakwaan memanglah sesuai.

(5) Mahkamah mempunyai kuasa untuk membatalkan satu tindakan kerana ketiadaa pendakwaan bukan cuma bila keingkaran plaintif adalah sengaja dan degil tetapi juga di mana terdapat kelengahan yang tidak berpatutan dan tidak boleh dimaafkan pada bahagiannya atau bahagian peguamnya yang mengakibatkan risiko besar bahawa perbicaraan yang adil tidak mungkin berlaku atau yang mengakibatkan prejudis yang serius kepada defendan.

(6) Apakah kelengahan yang tidak berpatutan adalah satu soalan fakta dan sebagai satu peraturan, sehingga satu sebab yang boleh dipercayai ditunjukkan, inferens yang kuat adalah bahawa kelengahan itu sememangnya tidak boleh dimaafkan.

(7) Kelengahan plaintif dalam keadaan kes ini berpanjangan, tidak berpatutan dan tidak boleh dimaafkan. Polisi awam menuntut bahawa urusan mahkamah harus dijalankan dengan cepat. Plaintif jelasnya telah membuang masa dan ianya telah menyebabkan masalahnya sendiri dengan tidak mendakwa tuntutannya dengan segera.

(8) Bukanlah terletak pada defendan untuk mengambil keluar saman untuk arahan sendiri.

(9) Kelengahan defendan dalam mendakwa tuntutan balas mereka tidak patut ditafsirkan melawan mereka.

(10) Sama ada kelengahan yang disebabkan oleh plaintif atau oleh peguamcaranya atau kedua-duanya membawa kesan kepada prejudis yang didatangkan kepada defendan bukanlah pertimbangan yang relevan dan bukanlah satu faktor yang patut dipertimbangkan apabila membuat keputusan sama ada untuk membatalkan tuntutan plaintif kerana ketiadaan pendakwaan.]

Notes

For cases on want of prosecution in civil procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3643–3656; [1994] *Mallal's Digest* 525–531; [1995] *Mallal's Digest* 376–383.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

Allen v Sir Alfred McAlpine & Sons Ltd [1968] QB 229 (folld)

Alloy Automobile Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Austin Securities Ltd v Northgate & English Stores Ltd [1969] 1 WLR 259; [1969] 2 All ER 753 (refd)

Birkett v James [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801 (folld)

Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd [1994] 1 MLJ 465 (refd)

Gan Hay Chong v Siow Kian Yuh & Anor [1975] 2 MLJ 129 (refd)

Leong Seng Kiat v Law Peng Guan [1992] 2 CLJ 825 (folld)

Overseas Investment Pte Ltd v Anthony William O' Brien & Anor [1988] 3 MLJ 332 (refd)

Ratnam v Cumarasamy & Anor [1965] MLJ 228 (refd)

Revici v Prentice Hall Inc [1969] 1 WLR 157; [1969] 1 All ER 772 (refd)

Schafer v Blyth [1920] 2 KB 143 (refd)

Scott & English (M) Sdn Bhd v Lei Kie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 (refd)

Sinnathamby & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)

United Malaysia Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd [1994] 2 AMR 32:1653 (refd)

Reginald Vallipuram (*Reginald Vallipuram & Co*) for the plaintiffs. A
Teoh Saw Lung (*Ho Thian Cheh & Co*) for the defendants.

Abdul Malik Ishak J: This was an application by the defendants in encl 41 to dismiss the plaintiffs' claim for want of prosecution under O 25 r 1(4) of the Rules of the High Court 1980 ('RHC'). That application was supported by an affidavit of Chui Miang Chew, the first and fifth defendants, affirmed on 11 August 1994 (encl 40) on behalf of himself and the rest of the defendants who happened to be his brothers and sisters. This application sparked off an array of affidavits filed by both sides and in chronological order these affidavits may be set out as follows: B C

(1) Reginald Vallipuram affirmed an affidavit in the English language dated 3 October 1994 (encl 43).

(2) Reginald Vallipuram affirmed another affidavit in the Malay language dated 5 October 1994 (encl 44).

(3) Chua Kon Sing affirmed an affidavit in the English language dated 1 October 1994 (encl 45). D

(4) Chua Kon Sing affirmed another affidavit in the Malay language dated 5 October 1994 (encl 48).

(5) Chui Miang Chew affirmed two affidavits dated 14 October 1994 in both the English and Malay languages (encl 50 and 51). E

(6) Chua Kon Sing affirmed two more affidavits dated 28 October 1994 in both the English and the Malay languages (encl 53 for these two affidavits).

(7) Reginald Vallipuram affirmed yet another affidavit dated 28 October 1994 in the Malay language which was dated and signed before the Commissioner for Oaths with an English version which was both undated and unsigned and these two versions were marked as encl 54. F

(8) Chui Miang Chew, once again, affirmed two affidavits dated 9 November 1994 in both the English and the Malay languages (encl 56 for these two affidavits). G

(9) Chui Miang Chew affirmed two more affidavits dated 9 November 1994 in both the English and Malay languages and these were marked as exh 57.

(10) Chua Kon Sing affirmed two more affidavits, one in the Malay language which was dated 23 November 1994 and signed before the Commissioner for Oaths and the other in the English language which was signed by the deponent but undated and the signature together with the rubber chop of the Commissioner for Oaths were missing. These two affidavits were marked as encl 59. H I

I pause here to say something about those personalities that affirmed those affidavits. Reginald Vallipuram acted as the plaintiffs' solicitors whilst Chua Kon Sing, a public accountant and who practiced under the style of KS Chua & Co, were the plaintiffs in this case.

Miss Teoh Saw Luan, the learned counsel for the defendants, raised preliminary objections and she argued on these lines. That encls 45 and 48 were served on the defendants' solicitors on 3 and 5 October 1994 respectively and these enclosures responded to the defendants' encl 40 which was in support of encl 41. Since encl 40 was filed and served on the plaintiffs' solicitors on 15 August 1994 (see exhibit marked 'CMC 1' of encl 50), encls 45 and 48 should be filed and served by the latest on 28 August 1994 on the defendants' solicitors. Put in another way, she argued that Chua Kon Sing's affidavits in encls 45 and 48 were filed and served out of time and that would run counter to O 32 r 13(2)(b) of the RHC as these two affidavits were meant to reply to Chui Miang Chew's affidavit that was affirmed on 11 August 1994 as per encl 40 which was in support of the application for dismissal of the plaintiffs' claim in encl 41. Order 32 r 13(2)(b) of the RHC reads as follows:

> Save as otherwise provided in these rules —
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

The delays for encls 45 and 48 were one month 18 days and one month 20 days respectively.

In regard to Reginald Vallipuram's affidavits in encls 43 and 44 in response to the defendants' affidavit in encl 40, it was argued that they were served on the defendants on 3 October 1994 (for encl 43) and on 5 October 1994 (for encl 44) whereas encl 40 was filed and served on the plaintiffs' solicitors on 15 August 1994 (see the affidavit evidence in encl 51 which sets out these details). The delays for encls 43 and 44 were of the same time frames as encls 45 and 48.

In so far as encl 40 was concerned, time begins to run from 15 August 1994 and this was agreed upon by Reginald Vallipuram in his submission before me but he prayed orally in aid of O 3 r 5(1) of the RHC to extend or abridge the time period. In so doing he applied for an adjournment to enable him to apply formally to enlarge time. In rebuttal, Miss Teoh Saw Luan argued against the adjournment. She submitted that it was unfair to the defendants if an adjournment was granted as the entire fault was not hers but that of Reginald Vallipuram. She pointed out that it was incorrect to say that the preliminary objections were raised without due notice to the plaintiffs as these were sufficiently referred to in encl 50 at para 6 onwards. It is now trite that the court will always exercise a discretion to extend time. That discretion, however, must be exercised with a view to the avoidance of injustice to the other parties (*Schafer v Blyth* [1920] 2 KB 143). It was held in *Revici v Prentice Hall Inc* [1969] 1 WLR 157; [1969] 1 All ER 772 (CA), that the rules as to time must be observed, and if substantial delay occurs without any explanation being offered, the court is entitled not to extend time. Here there was substantial delay and the reason for that delay was explained in encls 43 and 44 which, as Miss Teoh Saw Luan

rightly pointed out, relate to the ill-health of Reginald Vallipuram as the counsel for the plaintiffs. It is my judgment that the solicitor's ill-health for three to four years at a stretch which prevented him from attending to his files was rather unfortunate and cannot be an acceptable reason for an enlargement of time under O 3 r 5(1) of the RHC, even if there is a formal application for abridging time. It is quite obvious that to do justice to his client, Reginald Vallipuram should have referred his client's case to another solicitor who is able and willing to handle the case expeditiously and within the framework of the RHC. To go a step further, Reginald Vallipuram's mistake in not referring his client's case to another solicitor in town when he was taken ill must be construed against him and can no longer be the basis for an enlargement of time (see generally for comparison the cases of *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129; and *Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 MLJ 110 (SC) as cited in *Scott & English (M) Sdn Bhd v Lei Kie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424). On obedience to the Rules of Court, I need only cite the case of *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 (PC), where Lord Guest in an illuminating judgment had this to say:

> The Rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

That sums up the position of the plaintiffs in so far as O 3 r 5(1) of the RHC is concerned. Now, reverting back to O 32 r 13(2)(b) of the RHC which came by way of an amendment vide PU(A) 193/93 where it imposes on a party wishing to reply to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see O 32 r 13(2)(a) of the RHC). Thus, under this new O 32 r 13(2) of the RHC a strict time-table has been set by the Rules Committee and my impression of it is that it is draconian as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application. In the event the

respondent files an affidavit in reply which alleges a certain fact detrimental to the applicant, the applicant must reply otherwise those facts not replied will be deemed to be accepted by the applicant (*Alloy Automobile Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O' Brien & Anor* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287) and this must surely be the dilemma which the applicant must go through. The strict requirement under this rule will simply mean that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14-day period unless applications to file those affidavits out of time formally have been made and granted by the courts. In my judgment, the plaintiffs here have breached the strict requirements of O 32 r 13(2)(b) of the RHC. Bereft of any formal application to file those affidavits in encls 45, 48, 43 and 44 out of time, I have no choice but to ignore those affidavits. For the aforesaid reasons, I acceded to the defendants' preliminary objections.

Now to the heart of the matter.

It is appropriate, in the context of the defendants' application to dismiss the plaintiffs' claim for want of prosecution, to set out the background facts. These facts are as follows.

The plaintiffs' action was originally filed in the sessions court, Johor Bahru vide summons no 52-1989(3) on 8 March 1989. In that action, the plaintiffs claimed against the defendants a sum of RM88,229 being the amount due in respect of alleged professional services rendered by the plaintiffs to the defendants on a purported agreement. The said summons and the statement of claim were served on the second and sixth defendants on 24 May 1989 whilst the rest of the defendants were served on 29 September 1989. The defence of the second and sixth defendants dated 11 September 1989 (encl 22) was filed on 11 September 1989 and served on the plaintiffs' solicitors on 16 September 1989 whilst the defence and counterclaim in respect of the first, third, fourth and fifth defendants dated 18 December 1989 was filed and served on the plaintiffs' solicitors on 19 December 1989. In consequence of an order of court dated 2 April 1990, apart from the defence of the second and sixth defendants dated 11 September 1989 having been amended, a counterclaim was added to the said defence. The amended defence and counterclaim of the second and sixth defendants dated 6 April 1990 was filed on 10 April 1990 and served on the plaintiffs' solicitors on 25 April 1990. In the counterclaim, all the defendants sought for the following reliefs:

(1) a declaration that the purported agreement, if any, was a result of the undue influence of the plaintiffs over the defendants and thus it is null and void;

(2) a declaration that the plaintiffs hold all sums of money paid by the defendants to the plaintiffs by way of advances or otherwise as trustees for the said defendants at all material times;

(3) an order that the fees due to the plaintiffs be assessed and/or taxed by the senior assistant registrar of this honourable court;

(4) an account of all moneys received by the plaintiffs from the defendants and the payment and/or refund of the amount found to be due to the defendants on the taking of such account;

(5) interest on moneys found to be due to the defendants on the taking of such account;

(6) interest on the sums found to be due to the defendants;

(7) further and/or other relief; and

(8) costs.

The reliefs sought in that counterclaim of the defendants brought it outside the jurisdiction of the sessions court and thus by virtue of a court order dated 6 May 1990, the Johor Bahru Sessions Court Summons No 52-19 of 1989 (3) was transferred to the High Court, Johor Bahru. By way of a notice from the registry of the High Court, Johor Bahru dated 9 July 1990, both the solicitors for the respective parties were duly informed that the case docket had been transmitted from the sessions court, Johor Bahru to the High Court, Johor Bahru and that the said proceedings have been re-registered as High Court Civil Suit No 22-160-1990. That transfer to the High Court, Johor Bahru on 6 May 1990, triggered the application of the RHC to the whole case. It must be noted that as at 6 May 1990, no reply nor defence to counterclaim had been filed and served by the plaintiffs to the defendants or even to the defendants' solicitors. Now, I need to stress here that once the case was transferred to the High Court, Johor Bahru on 6 May 1990, there was complete inactivity by the plaintiffs and their solicitors to pursue their claim or to take any other action for the last four (4) years. The plaintiffs and/or its solicitors manifestly neglected or omitted to do the following acts:

(a) failure to file and serve a reply and defence to counterclaim to the defendants or to the defendants' solicitors within the time stipulated in O 18 r 3(4) of the RHC;

(b) failure to take out a summons for directions within the time stipulated under O 25 r 1(4) of the RHC.

To appreciate the procrastination on the plaintiffs' part further, it is germane to mention that the counterclaim in respect of the first, third, fourth and fifth defendants dated 18 December 1989 had been filed and served on the plaintiffs' solicitors since 19 December 1989. Likewise, the amended defence and counterclaim of the second and sixth defendants dated 6 April 1990 had been filed and served on the plaintiffs' solicitors since 25 April 1990. Yet, the plaintiffs and their solicitors saw it fit to drag their feet and chose to act to their detriment when they:

(1) filed and served the reply and defence to counterclaim to the defendants on 8 June 1994; and

(2) filed and served on the defendants on 14 July 1994, the summons for directions which was scheduled for hearing on 16 August 1994.

These delays when computed after the date of the last service of the amended defence and counterclaim of the second and sixth defendants to the plaintiffs were more than four (4) years and certainly well after the close of the pleadings without a single court order allowing the plaintiffs to enlarge time to cover their misdeeds. Indeed at no time at all did the plaintiffs and/or solicitors obtained the defendants' consent for an extension of time.

It was said that the plaintiffs and/or its solicitors' default was intentional and contumelious and such default had delayed the administration of justice. It was said further that to allow the plaintiffs' claim to proceed to trial at this stage would be vexatious and an abuse of the process of the court. It was argued before me that the plaintiffs' reply and defence to counterclaim dated 8 June 1994 which the plaintiffs and/or solicitors deemed it fit to file and serve on the defendants at such a late stage after pleadings were deemed to be closed on 10 May 1990 pursuant to O 18 r 20(1)(b) of the RHC, ought to be struck out pursuant to O 18 r 19(1) of the RHC. I agreed, wholeheartedly, with these potent submissions. What the plaintiffs did was certainly an abuse of the process of the court as there were no applications made or an order of the court obtained by either the plaintiffs or their solicitors to enlarge time to enable them to file and serve the reply and defence to counterclaim on the defendants. It is germane to mention that under O 18 r 3(4) of the RHC, the plaintiffs' reply and defence to counterclaim ought to be served within 14 days after the amended defence and counterclaim of the second and sixth defendants dated 6 April 1990 was served on the plaintiffs' solicitors on 25 April 1990 and flowing from this, by way of computation, the last date of filing and serving the reply and counterclaim should be 10 May 1990. From the recital of the facts as aforesaid, the plaintiffs and/or their solicitors have failed to comply with the stipulated time period. A scrutiny of the plaintiffs' reply and defence to counterclaim dated 8 June 1994 revealed the defence to be no more than a bare denial. Reverting back to the summons for directions served and filed on the defendants on 14 July 1994 which was inordinately delayed for sightly over four years, it should best be described as intolerable and inexcusable. The defendants must have suffered much anxiety and distress as the plaintiffs' claim of RM88,229 were still pending and it constituted serious and grave prejudice to the defendants. It was argued and I fully subscribed to it that in the event the plaintiffs' case went for trial and judgment was in favour of the plaintiffs, the defendants would have to incur an enormous amount of interest computed at 8% pa from the date the statement of claim was originally filed in the sessions court, Johore Bahru on 8 March 1989 till the date of judgment. There was another factor which should weigh in favour of the defendants. From the statement of claim, it was apparent that the cause of action arose in January 1988, and by January

1993 that cause of action had abated. It is trite that where any relevant period of limitation has not expired it is pointless to dismiss an action for want of prosecution because another action can be started for the same subject matter (*Austin Securities Ltd v Northgate and English Stores Ltd* [1969] 1 WLR 529; [1969] 2 All ER 753 (CA)). Thus, in so far as the present case was concerned since limitation had set in, the application by the defendants to dismiss the plaintiffs' claim for want of prosecution was indeed apt.

Birkett v James [1977] 3 WLR 38; [1977] 2 All ER 801; [1978] AC 297 (HL) lays down the now famous principle that the court has the power to dismiss an action for want of prosecution, not only where the plaintiff's default has been intentional and contumelious but also where there has been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendant. The facts in that case were that the plaintiff there by writ issued on 25 July 1972, claimed against the defendant £1,000,000 which he alleged had become due to him on 1 April 1970, pursuant to oral agreements made between the parties by at latest 3 December 1969. The defendant by his defence denied that any such agreements had been made. The action proceeded with reasonable dispatch until 28 June 1973, when an order was made for the trial of preliminary issues of fact as to whether or not the alleged agreements had been made. The order required the action to be set down for trial within 28 days, but it was not set down and no further steps were taken by the plaintiff in the action until 23 July 1975, when he gave notice of intention to proceed. The defendant by summons of 2 October 1975, some six months before the limitation period applicable to the plaintiff's cause of action was due to expire, applied for an order to dismiss the action for want of prosecution. The district registrar refused the order and the defendant appealed. On 26 March 1976, between the conclusion of the hearing of the appeal before Cobb J and the delivery of his judgment, the plaintiff took the precaution of issuing a fresh writ in respect of the same cause of action. In his judgment, allowing the defendant's appeal and dismissing the action for want of prosecution, Cobb J excluded from his consideration the fact that the limitation period not yet expired, saying that he did not have to speculate, and did not speculate, as to what the plaintiff might do in the light of his decision. The plaintiff appealed to the Court of Appeal, which dismissed the appeal. They were informed of the issue and service of the fresh writ, but did not refer to it in their judgment. On appeal by the plaintiff by leave of the House of Lords, their Lordships allowed the appeal with costs and restored the order of the district registrar. Legal and taxation of the plaintiff's costs was ordered.

Lord Diplock delivering a separate judgment in *Birkett v James* (supra) traced the modern practice of dismissing an action for want of prosecution. His Lordship had this to say:

> The modern practice as to dismissing actions for want of prosecution dates from 1967. By that time the dilatory conduct of proceedings in the

> High Court by solicitors to plaintiffs whose causes of action would turn on the reliability of witnesses' recollections of past events had become a scandal, particularly in the case of those who litigated with the help of legal aid. Postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice could not be done. True it is that at the trial the evils of delay would be likely to bear more heavily on the plaintiff on whom the onus would lie of proving that things had happened as he alleged, but the risk that justice would not be done to him extended also to the defendant and, even if successful at the trial, the defendant was likely to be out of pocket for his costs, which in legally aided cases he had little prospect of recovering.

Mohamed Dzaiddin J (now FCJ) in *Leong Seng Kiat v Law Peng Guan & Ors* [1992] 2 CLJ 825 considered two years eight months' delay on the part of the plaintiff to prosecute the action which was calculated from the time he was served with the defence until the filing of the summons-for-directions as inordinate and fatal.

In *United Malayan Banking Corporation Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1994] 2 AMR 32:1653, his Lordship Mohamed Dzaiddin SCJ (now FCJ), after considering the various authorities on the subject of dismissal of an action for want of prosecution including *Birkett v James* (supra), was prepared to overlook the delay and ordered that the case proceeded for trial simply because there was an 'earnest desire of both parties to reach an amicable settlement which did not succeed.' It is quite obvious that the present case can easily be distinguished from *United Malayan Banking Corporation Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* (supra) in that here both parties did not negotiate for a settlement. Here, the mistake was entirely that of Reginald Vallipuram who procrastinated as to cause serious prejudice to the defendants.

From the authorities, what constitutes inordinate delay is a question of fact and as a rule, until a credible excuse is made out, the irresistible inference is that that delay is patently inexcusable. As Lord Denning MR in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] QB 229 succinctly said:

> When the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away.

From the recital of the facts, it is my judgment that the plaintiffs took time in prosecuting their claims after the case was transferred to the High Court on 6 May 1990 and such delay was, in the circumstances, prolonged, inordinate and inexcusable. Public policy demands that the business of the courts should be conducted expeditiously. The plaintiffs clearly procrastinated and they authored their own downfall by not expeditiously prosecuting their claims.

Lest I be accused of an oversight, it was argued that the defendants failed to take out the summons-for-directions themselves and this should be construed against them. The short answer is provided by Mohamed

Dzaiddin J (now FCJ) in *Leong Seng Kiat v Law Peng Guan & Ors* (supra) where his Lordship said:

> I am aware that under r 1(4), if the plaintiff does not take out the summons for directions the defendant may either do so himself or apply for an order to dismiss the action. In my opinion it is not incumbent on the third defendant's solicitors to take out the summons. He may choose one or the other.

Next, it was argued that the defendants had delayed in prosecuting their counterclaim and this should be construed against them. First and foremost, the plaintiffs did not file an application to dismiss the defendants' counterclaim for want of prosecution and without that formal application, this court was not barred from adjudicating the defendants' application to strike out the plaintiffs' claim for want of prosecution. In a similar vein, Abdul Kadir Sulaiman J in *Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd* [1994] 1 MLJ 465 especially at p 475 said:

> On an application made by a defendant to have the claim of the plaintiff dismissed for want of prosecution under O 34 r 2(2) of the RHC, the court cannot refuse the application of the defendant solely on the ground that the defendant has a counterclaim and it has delayed in pursuing the counterclaim whilst the plaintiff has not made an application to have the counterclaim dismissed. Order 34 r 2(2) of the RHC gives the power to the court to dismiss the action of the plaintiff for want of prosecution on the application made by the defendant where the plaintiff does not within the time fixed, set the action down for trial. For the purpose of O 34 r 2(2), a defendant is also a plaintiff in relation to its counterclaim against the plaintiff. So, unless there is an application by a defendant in regard to the plaintiff's claim or an application by the plaintiff in regard to the defendant's counterclaim, the court cannot exercise its powers under O 34 r 2(2) of the RHC to dismiss the action of the plaintiff or the defendant as the case may be, for want of prosecution.

Since I have ruled that the affidavits in encls 45, 48, 43 and 44 should not be considered for purposes of adjudicating the defendants' application to dismiss the plaintiffs' claim for want of prosecution, it follows that now there is no material for me to fall back on to decide whether the inordinate delay by the plaintiffs to prosecute their case is excusable. Reginald Vallipuram's affidavits at encls 43 and 44 reflect the reasons behind the delay which I have in the early part of this judgment adverted to as being one of ill health whilst deliberating on the preliminary objections raised by the defendants. Before me, Reginald Vallipuram takes the blame for the inordinate, prolonged and inexcusable delay in prosecuting the plaintiffs' claim despite my ruling. What am I supposed to do with counsel who submits and admits that he was unwell at the material time and crave this court's indulgence to throw the RHC to the wind? Must the illness of counsel be a good ground for this court to accept his explanation for the unduly long and inordinate delay in prosecuting the case in court? Must the discretion be exercised in favour of counsel for the plaintiffs at the expense of the defendants? To accede to the plaintiffs' counsel's request would mean opening the

floodgates and this would encourage unhealthy practices amongst lawyers in Johor Bahru. 'Lawyering' is not an easy job. It requires hardwork, skill, patience, knowledge of the law and, above all, good health and some measure of luck. Ill health is nothing more than an occupational hazard. Ill health can never bring success and there is no short cut to success either. This court is not a court of moral but a court of justice. Breaches of the rules will not be lightly taken. It is germane to mention here that the fact that the plaintiffs may or may not have an alternative remedy against Reginald Vallipuram is not a relevant consideration and is not a factor to be considered in considering whether to dismiss the plaintiffs' claim for want of prosecution. Lord Diplock in *Birkett v James* (supra) explained it rather well and for brevity it is reproduced below:

> Where an action is dismissed for want of prosecution the fault must lie either with the plaintiff or with his solicitors or both. Which of them is to blame for the inordinate and inexcusable delay does not affect the prejudice caused to the defendant, which is the jurisdiction for the dismissal of the action; nor should it, in principle, affect his remedy. If it were a matter which the judge ought to take into account in deciding whether to dismiss the action, the court on an interlocutory application in an action between different parties would have to embark upon what in effect would be the trial of an action by the plaintiff against his actual or former solicitor for professional negligence. That, clearly, is impossible, and apart from an initial hesitation by Sachs LJ in *Sayle v Cooksey* [1969] 2 Lloyd's Rep 618 at 625 there has been a consensus of judicial opinion in the Court of Appeal that the question of what remedy, if any, the plaintiff will have against his solicitors if his action is dismissed is an irrelevant consideration: *Paxton v Allsopp* [1971] 1 WLR 1310.
>
> Sachs LJ's hesitation was based upon some observations in my own judgment in *Allen v McAlpine* [1968] 1 All ER 543 made in the context of a case where there was no question that the sole blame lay with the plaintiff's solicitor and that the only reason why her remedy against him would be ineffective was his impecuniosity. My Lords, on further consideration of the difficulties which would be involved if the court may take into account the prospects of the plaintiff having an effective remedy against his solicitors I think that I was wrong in saying that this was a relevant consideration. On the facts of the case to which my mind was then directed those difficulties were not apparent.

I need to briefly say that encls 50, 51, 53, 54, 56, 57 and 59 were all tied up with one another and it arose out of and in response to encls 43, 44, 45 and 48. Thus, encl 50 was affirmed in response to encls 45 and 48. Enclosure 51 was affirmed in answer to encls 43 and 44. Enclosure 53 was affirmed as a reply to enclosure 50. Enclosure 54 was affirmed in answer to encl 43 and it adverted to the telephone conversation between Reginald Vallipuram and Ho Thian Cheh (a practising lawyer in Johor Bahru) where Reginald Vallipuram once again raised the subject matter of his ill health and his promise to Ho Thian Cheh that he would attend to the file by the following week. Enclosure 56 was affirmed by way of reply to encl 54 where it was said that the telephone conversation between Reginald Vallipuram and Ho Thian Cheh was entirely without

prejudice to the defendants' rights or remedies and Ho Thian Cheh was not instructed to enter into any conversation prejudicial to the defendants' rights and/or interests. Whereas encl 57 was affirmed in reply to encl 53 and, lastly, encl 59 was in response to encl 57. In short, these enclosures were in the nature of replies and nothing else.

For the reasons adumbrated above, I granted prayers 1, 2, 3, 4 (i) and (ii) and 5 of encl 41.

Application allowed.

Reported by Rebecca MK Lee